

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13, 220

EDWARD J. FARRELL,

Appellant

v.

JAMES P. DONOVAN,

JESSUP PARK DEVELOPMENT CORPORATION,

ELIZABETH W. CLARK BROWN,

and

GEORGE E. BROWN,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Mark P. Friedlander✓

Room 502 Hill Building
839 - 17th Street, N. W.
Washington 6, D. C.

Attorney for Appellant.

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED APR 20 1956

Joseph W. Stewart
CLERK

(i)

No. 13,220

STATEMENT OF QUESTIONS TO BE PRESENTED

As to the Appellees Brown

1. May the United States District Court for the District of Columbia have jurisdiction over cases where the defendants do not reside in the District of Columbia?
2. Do the provisions of Title 28, Section 1391, apply to the United States District Court for the District of Columbia?

STATEMENT OF QUESTIONS TO BE PRESENTED

As to the Appellees Donovan and Jessup Park Development Corporation

1. Where a real estate broker successfully obtained execution of an agreement of purchase and sale of land, and where a purchaser made a deposit of a substantial sum of money with said broker, and where the sellers agreed to pay a commission of 10% of the sale price, did the District Court have jurisdiction of a suit seeking recovery of commissions from both sellers and purchaser on the grounds that said sellers and purchaser had agreed to cancel said contract?
2. Where a deposit was put up by the purchaser with the broker under the terms of an executed contract of sale of land, and thereafter the sellers and the purchaser agreed to cancel the contract, did the District Court have jurisdiction to determine the rights of the broker to the deposit?

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UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 13,220

EDWARD J. FARRELL,
Appellant

v.

JAMES P. DONOVAN,
JESSUP PARK DEVELOPMENT CORPORATION,
ELIZABETH W. CLARK BROWN,
and
GEORGE E. BROWN,
Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

STATEMENT OF THE CASE

Appellant brought suit alleging that he was a real estate broker and that he had been the procuring cause of a contract for the sale of certain land in Anne Arundel County, in the State of Maryland, and that he had become entitled to a commission of ten per cent of the total purchase price which he alleged would have amounted to \$11,500.00.

He further alleged that he had received into his possession the sum of \$5,750.00 which had been delivered to him by the Appellee, James P. Donovan, as a deposit on the purchase.

He further alleged that the contract of purchase had been assigned by the Appellee, Donovan, to the Jessup Park Development Corporation,

a Maryland corporation, and that the contract was delayed by all the parties thereto from the 30th day of December, 1954, until the middle of August, 1955; and that the said Appellee, Donovan, had failed to apply for approval of the Federal Housing Administration and the Veterans Administration as to loans on the buildings to be constructed on the property, and that the Appellees, Brown, failed to take any steps to rezone the ground for rural residential development, although the contract called for them to do so.

Farrell further alleged that in the fall of 1955, while the contract was still in full force and effect, although delayed as to settlement, the Appellees, and all of them, wrongfully determined that the contract would not be effective and demanded that the deposited sum of \$5,750.00 be returned, and represented to the Appellant that notwithstanding his labor and efforts he would receive nothing by way of commission; and the Appellant thereupon sued all the parties to the contract, including the original purchaser and his assignee, as well as the sellers under the contract.

To this complaint the appellees Brown filed a motion to dismiss, claiming that there was no venue. This motion was granted, and an appeal from such order is before this Court. The defendant Donovan and the Jessup Park Development Corporation, filed a motion to dismiss on the grounds that no cause of action was stated, this motion was granted, and from the order granting said motion this appeal was taken.

This Court has jurisdiction of the appeal under Title 28, United States Code, Sections 1291 and 1292.

STATEMENT OF THE FACTS

Elizabeth W. Clark Brown and George E. Brown, Appellees herein, were the owners of certain unimproved land in Anne Arundel County, in the State of Maryland, about fourteen miles southwest of the City of Baltimore, for a long time prior to the 30th day of December, 1954. Long

prior to that time — on, to wit, April 12, 1947, the appellee George E. Brown had, by his writing under seal, appointed his wife, Elizabeth W. Clark Brown, as his lawful attorney in fact in all matters relating to real estate in the State of Maryland, and had given her the power by this recorded instrument to sell or otherwise dispose or encumber the property in the said State of Maryland.

That on the 30th day of December, 1954, a contract for the sale of the land above described was entered into by the said Appellees, Brown, the signature of George E. Brown being made by Elizabeth W. C. Brown under her power of attorney. That the Browns signed as sellers, and James P. Donovan signed as purchaser. That the said James P. Donovan at the time of the making of the contract deposited with the Appellant herein the sum of \$5,750.00, agreeing that the entire deposit was to be held by the said Appellant until settlement was made. That the said Appellant was the procuring cause of the sale and had as a licensed real estate broker obtained the contract and had performed his services towards making the agreement of sale. That the sellers — that is to say, the Browns — had agreed to pay to Edward J. Farrell a commission amounting to ten per cent of the total purchase price. That the purchase price was \$115,000.00, or \$809.86 per acre for said tract, whichever amount was the smaller.

Under the terms of the contract it was subject to approval by the Federal Housing Administration and the Veterans Administration as to loans on the buildings to be constructed on the property, but the appellee Donovan failed to apply for such approval. That the contract also provided that the appellees Brown were to have the tract rezoned for rural residential development, yet said appellees Brown did not take any steps in that regard.

Settlement under the contract was delayed by the parties to the contract from time to time until the 17th day of August, 1955, when the appellee Donovan transferred and assigned to the Jessup Park Development

Corporation all his right, title and interest in and to the contract referred to; and thereafter in the fall of 1955 the Appellees herein wrongfully determined that the contract would not be effective and demanded that the deposit on said contract be returned, and indicated to the Appellant that he was to receive no compensation for his services.

STATEMENT OF POINTS

As to Appellees, Brown:

1. There was venue in the District of Columbia, even though all the parties were not residents of the District, and the Court erred in holding that the United States District Court for the District of Columbia was improper venue for a proceeding in which the plaintiff was a resident of Virginia but engaged in business in the District of Columbia, one of the defendants was a resident of the District of Columbia, another defendant was a corporation organized and existing under the laws of the State of Maryland, and the other defendants were residents of the State of Maryland.

2. The Court erred in holding that the United States Statute, 28 U.S.C., Sec. 1391, applied to this case.

As to Appellees, Donovan and Jessup Park Development Corporation:

3. The Court erred in holding that the suit brought below was a simple claim for real estate commission and would not lie against the appellees Donovan and the Jessup Park Development Corporation, as they were the purchasers under the contract.

4. The Court erred in holding that it had no jurisdiction to determine what should happen to the real estate deposit in this proceeding where all the parties were before the Court.

5. The Court erred in holding that the complaint failed to state a cause of action against any of the appellees.

SUMMARY OF ARGUMENT

As to Appellees, Brown:

There is located in the District of Columbia the sum of \$5,750.00, a deposit under the terms of the contract involved herein, and the application of this deposit towards the commissions to be paid on the grounds of a default on the part of a purchaser should have been determined by the Court; and under the provisions of the D. C. Code, the District Court has that jurisdiction which a local court would have had and is not limited in scope as are other federal courts in the States. In other words, the United States District Court for the District of Columbia is a combination local and federal court.

As to Appellees, Donovan and Jessup Park Development Corporation:

The appellee Donovan, having deposited \$5,750.00 with Appellant for Appellant to hold until the settlement was made, was properly before the Court in a suit to determine whether or not the contract was breached by him or the corporation, and the mere fact that in said suit it was suggested that he might owe all of the commission did not constitute grounds for the dismissal of the action.

ARGUMENT

As to the Appellees, Brown:

At the hearing on the motion to dismiss the Court signed the Order which is set forth in the Appendix, and the said Order provided:

". . . . and it appearing to the court that the defendants, Elizabeth W. Clark Brown and George E. Brown, are residents of the State of Maryland and that there is no venue in this court for this case, ..."

Venue is the place of trial of an action. —McKenna v. Fisk, 1 Howard 241, 11 Law Ed. 117. Venue is distinguished from jurisdiction, in that jurisdiction connotes the power to decide a case on its merits, while venue connotes locality. —Edgewater Realty Co. v. Tenn. Coal . . R. R. Co., 49 F. Sup. 807, 809; Iselin v. LaCoste, 147 F. 2d 791, 795.

Causes of action which arise out of contracts are generally transitory. —U.S. v. U.S. Fed. and Guaranty Co., 106 F. 2d 804 (this case was reversed, but on other grounds), 309 U.S. 506, 84 Law Ed. 894.

Thus the Court held that there was no venue or the right to hear the case as to the appellees Brown, basing its decision apparently on the provisions of Title 28, U.S. Code, Section 1391, which in substance provides that a civil action founded on diversity of citizenship may be brought only in the judicial district where all the plaintiffs or all the defendants reside; and sub-section (b) of Title 28, Section 1392 of the United States Code, provides that where cases are not founded on diversity of citizenship, they may be brought only in the judicial district where all defendants reside. *

* In the official transcript of the argument Mr. Warfield's contentions are set forth on pages 21, 22 and 23, including a statement of fact which is contrary to the allegations of the complaint and which of course will be ignored by this Court.

The provisions of the District of Columbia Code, Title 11, Section 306, gave the United States District Court for the District of Columbia jurisdiction of this case, and the case was not brought under the provisions of Title 28. If the Court below was right, then no residents of Virginia or Maryland may be sued in the District Court even though they have their places of business here, and many cases now pending in the District Court do not have proper venue. ** We are not dealing with the question of service of process, as no motion to quash service was ever made.

In Hoffman v. Wash. -Virginia Ry. Co., 44 App. D. C. 418, the Court will find helpful language in a discussion of some phases of this question; and in King v. Wall and Beaver Street Corp., 79 U. S. App. D. C. 234, 145 F. 2d 377, this problem is also discussed.

As to the Appellees, Donovan and Jessup Park Development Corporation:

The facts alleged in the complaint are admitted due to the filing of the motion to dismiss, and we will presume for the purpose of this appeal that the Appellant is entitled to set forth the facts there alleged the same as if such facts had been proven at a trial.

The Appellant, a licensed real estate broker, procured a purchaser, ready, willing and able to buy on the terms set forth by the sellers, and as a result thereof the parties in writing agreed to the purchase and sale, and duly executed the document. The commission to be paid under the terms of the contract was 10% of the purchase price, and the deposit put up was to be held by the Appellant until settlement, or in the event of a default

** To fully appreciate the error committed by the learned trial Court below we need only consider the attachment statutes of the District of Columbia set forth under Title 16, Section 301, of the D. C. Code, where it is provided that in any action at law in the United States District Court for the District of Columbia an attachment before judgment may be made under certain circumstances where the defendant is not a resident of the District. Under Title 28 and in the other District Courts of the United States there is no provision for attachment before judgment based on non-residence.

on the part of the purchaser the deposit could be forfeited, and under such circumstances one-half of the deposit was to go to the Appellant and the other half would be given to the sellers. The ultimate disposal of the deposit should be determined in this action. Either it should be applied against the commissions owed by the sellers, or be disposed of in some other manner. The dismissal of the suit, insofar as the deposit was concerned, was error.

But going one step further it will be seen that the settlement of the contract was delayed for a long period of time, and neither the sellers nor the purchaser took steps to comply with the terms of the contract — that is to say, the purchaser did not apply to the Federal Housing Administration or the Veterans Administration for approval, and the sellers did not seek the rezoning of the property as called for by the contract; but both the sellers and the purchaser, almost some ten months after the contract was made, decided that the contract should be cancelled and that the broker should receive nothing for his services.

As will be suspected from the nature of the facts, this is not a new problem, and as early as Dotson v. Milliken, a similar proposition was before the Court. — 27 App. D. C. 500. On page 514 this Court said:

"It is well settled that when an agent employed for the purpose, procures a purchaser willing and able to buy on the authorized terms, he becomes entitled to his compensation although the sale may not be consummated, provided consummation is prevented by the refusal, fault, or defective title of the principals (citing authorities)."

So we find, early in the reports of this Court, that an agreement to cancel a contract would not prevent the recovery of a commission by a broker. The argument in the court below was based not on this proposition, but under the proposition that under no circumstances would the purchaser be ever liable for commission because under the terms of the contract the sellers had agreed to pay it, and not the purchaser. There

is support for this proposition in the adjudication of this Court. — See, Giovannoni et al. v. Waple & James, Inc., 70 App. D. C. 229, 105 F. 2d 108. But in that case the real estate broker was not a party or privy to the contract of sale, nor were the buyers parties or privies to the real estate broker's contract with the seller for commission (page 230 of the opinion).

Our approach to the problem is different, as we submit to the Court that a binding agreement was made, and the sellers and purchaser did by their agreement cancel the contract. That they had a right to cancel the contract between them, there can be no doubt, but what effect did that have on the real estate broker and his commission? Many years ago the Supreme Court of the United States said:

"Where one party to an executory contract prevents the performance of it, or puts it out of his own power to perform it, the other party may regard it as terminated and demand whatever damage he has sustained thereby." — Lovell v. St. Louis Mutual Life Ins. Co., 111 U.S. 264, 274; 28 Law Ed. 423, 426.

It is true that in the Giovannoni case, supra, this Court said that the purchaser in the situation there existing would not be liable in damages to the broker resulting from his breach of the contract of sale, and cited numerous cases. We think that decision is distinguishable by another point, and that is that the agreement in this case at bar called for the broker to be entitled to 10% of the purchase price. Therefore, the contract made was to pay the sellers 90% and the broker 10%. This distinction has been discussed in the annotation at 58 A. L. R. 1497, and it is very true that there are no decisions in this jurisdiction to support this proposition. We think there should be.

Basic law is predicated on right, and certainly the real estate agent in this case, who was interested in 10% of the purchase price, has a right to enforce that portion of the contract, even though the sellers and the purchaser have agreed to cancel the contract. It must be conceded that

if the decision above set forth in the Giovannoni case is strictly followed, there could be no basis for a claim for damages in this case. We think the decision in that case should be limited. Otherwise, manifest injustice will be done, as illustrated in the case at bar.

Some distinction may be made between the terms of the contract which provide for the sellers to pay to the broker a commission amounting to 10% of the total purchase price as distinguished from the broker being entitled to recover that 10% from the purchaser, and if such technical distinction exists, then of course our position may be weaker; but there is no need to presume that there is any difference in fact from the agreement of the sellers to pay 10% of the purchase price when received and the payment from the settlement proceeds of 10% without it going through the hands of the sellers. As a practical matter, the provisions of the contract as written are the same as if the broker were entitled to 10% out of the purchase price.

We concede without dispute that ordinarily the vendor alone is liable for the payment of the commission due to a real estate broker employed by him to sell the property, and the purchaser's only liability is to pay the owner the agreed price. It is fair to state that the adjudicated cases clearly support this view. But this is not the ordinary case, as here there was no simple breach of the contract with the resulting forfeiture of the deposit, but a considered effort on the part of all parties to the contract, except the broker, to cancel the agreement some ten months after it had been made, and insofar as the record is concerned, without any reason therefor.

CONCLUSION

We do not believe that this proposition has ever been presented to this Court, and we respectfully urge this Court to limit its prior decision so as not to apply to facts of this type, but to hold the parties to this contract liable for their wrong or breach, and to reverse the case so that the same may be tried and the facts determined.

Respectfully submitted,

Mark P. Friedlander

Mark P. Friedlander

Rm. 502 Hill Building
839 - 17th Street, N. W.
Washington 6, D. C.

Attorney for Appellant

(i)
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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

39	[Filed Nov. 21, 1955]	:	
	EDWARD J. FARRELL	:	
	1645 Wisconsin Ave., N.W.	:	
	Washington, D.C.,	:	
	Plaintiff,	:	
	vs.	:	Civil Action No. 5093-'55
	JAMES P. DONOVAN	:	
	Barr Building	:	
	912 - 17th St., N.W.	:	
	Washington, D.C.	:	
	JESSUP PARK DEVELOPMENT	:	
	Corporation, a corporation	:	
	c/o James P. Donovan	:	
	Barr Building	:	
	912 - 17th St., N.W.	:	
	Washington, D.C.	:	
	and	:	
	ELIZABETH W. CLARK BROWN	:	
	and	:	
	GEORGE E. BROWN	:	
	Anne Arundel County	:	
	Maryland	:	
	Defendants.	:	

1. The Plaintiff is a resident of the State of Virginia and a citizen of the United States, and is a licensed real estate broker for the State of Maryland and the District of Columbia. He brings this suit to recover real estate commissions due him as procuring cause of a sale of real estate located in Maryland.

The Defendant, James P. Donovan, is a resident of the District of Columbia and a citizen of the United States, and is sued as the purchaser named in a contract of sale of real estate.

The defendant corporation is a corporation organized and existing

under the laws of the State of Maryland, and is named as a Defendant
40 herein by reason of the assignment of the contract of sale to it by
the Defendant, James P. Donovan.

The Defendants, Elizabeth W. Clark Brown and her husband George E. Brown, are residents of the State of Maryland and citizens of the United States, and are named as the sellers under the contract of sale of real estate located in Jessup, Maryland.

The amount involved herein is more than \$3,000.00.

2. On the 12th day of April, 1947 the defendant George E. Brown did by his power of attorney authorize and empower the defendant Elizabeth W. Clark Brown to act as his attorney in fact and to sign, seal and acknowledge any deed or deeds, and in general do and act for him in all matters and things relating to real estate.

3. Prior to the 30th day of December, 1954 the said Defendants, Elizabeth W. Clark Brown and George E. Brown did authorize and empower the Plaintiff herein to offer for sale the following described real estate:

"All that tract or parcel of land, and all appurtenances thereto, situate, lying and being in District 4, Anne Arundel County, State of Maryland, about fourteen miles southwest of the City of Baltimore, and beginning about 1,000 feet west and south of the intersection of the Washington-Baltimore Parkway, with Maryland Route 175, and extending south of said Route 175 for a distance of approximately one mile, consisting of 150 acres, and reserving therefrom unto the Sellers approximately eight acres of said tract located in the northeast corner thereof, on which the buildings, and improvements are located, it being the intention of the parties that the tract of land conveyed by this agreement shall be all the land owned by the Sellers in this tract with the exception of the above mentioned reservation of approximately eight acres."

4. In conformity with his authorization the Plaintiff did procure the defendant James P. Donovan as a purchaser of said property and, as a result of the services of the Plaintiff, a contract between the defendants

Brown and the defendant Donovan was entered into on the 30th day of December, 1954 for the sale and purchase of said property under certain terms and conditions, including the provision that the buyer, James P. Donovan, agree to pay the sum of \$115, 000. 00, or \$809. 86 per acre

41 for said tract, whichever amount was the smaller; and the said Donovan did then and there pay to the said Edward J. Farrell, Plaintiff, the sum of \$5, 750. 00, and the said Plaintiff acknowledged the receipt thereof and holds and has the same. It was further provided that the sellers, who are the defendants Brown, agree to pay to the Plaintiff a commission amounting to 10% of the total purchase price, and the contract provided for the said Plaintiff to hold the entire deposit of \$5, 750. 00 until settlement was made.

The contract also provided that if the buyer, James P. Donovan, failed to make settlement as provided for in the agreement, then the deposit made by him should be forfeited to the sellers and in such an event, the Plaintiff would become entitled to one-half of such sum as a compensation for his services.

5. Thereafter the settlement of the contract was delayed with the consent of all the parties and, on the 17th day of August, 1955, the defendant James P. Donovan did transfer and assign to the Jessup Park Development Corporation all his right, title and interest in and to the contract referred to herein.

6. Under the terms of the contract it was subject to approval by the Federal Housing Administration and the Veterans Administration as to the loans on the buildings to be constructed on the property, but the defendant James P. Donovan has failed to apply for such approval and, although the contract provided that the defendants Brown were to have the tract rezoned for rural residential development, yet the defendant Donovan requested and caused the Defendants, Brown, not to take any steps in that regard.

7. During the fall of 1955 while the contract was still in full force and effect the Defendants, and all of them acting individually or through their agents, wrongfully determined that the contract made would not be effective and have demanded and requested that the deposit on said contract be

42 returned, and have represented to the Plaintiff that notwithstanding his labor and efforts in this regard he shall receive nothing by way of commission; and, on October 28, 1955 the Plaintiff received a communication from James P. Donovan demanding a return of the deposit, and also on the same date Plaintiff received a notice from the defendants Brown of the cancellation of said contract.

8. Your Plaintiff is without remedy except such remedy as this Honorable Court can provide for him. The commission due on said sale is \$11, 500. 00.

WHEREFORE, Plaintiff claims of the defendants Brown the sum of \$11, 500. 00, and either alternatively or conjunctively seeks a judgment against the defendant James P. Donovan in the sum of \$11, 500. 00; and Plaintiff further seeks discovery of those facts underlying the newest arrangement between the defendants Donovan and Brown insofar as this property is affected, and also seeks discovery of the name in which the property is now being purchased.

/S/ Mark P. Friedlander
Attorney for Plaintiff

DEMAND FOR JURY TRIAL

Plaintiff demands a jury trial herein.

/S/ Mark P. Friedlander.

43 [Filed Dec. 15, 1955]

MOTION TO DISMISS

Come now the defendants, JAMES P. DONOVAN and JESSUP PARK DEVELOPMENT CORPORATION, through their attorney, and as to them, move this Court to dismiss the action herein, because the complaint fails to state a cause of action against them, upon which relief can be granted.

/S/ GUY M. BAYES
Barr Building
Washington, D. C.
Attorney for James P. Donovan
and Jessup Park Development
Corporation, Defendants

44 [Filed Dec. 21, 1955]

MOTION TO DISMISS

Come now the Defendants Elizabeth W. Clark Brown and George E. Brown, by their Attorney Frank L. Warfield and move the Court as follows:

1. To dismiss the cause of action filed herein for the reason that:
 - a) The complaint shows on its face and in paragraph one that the Defendant James P. Donovan is a resident of the District of Columbia; that the Defendant Jessup Park Development Corporation is a Maryland corporation; and that the Defendants Elizabeth W. Clark Brown and George E. Brown are residents of the State of Maryland.
 - b) The defendants Elizabeth W. Clark Brown and George E. Brown, being residents and citizens of the State of Maryland, are neither subject to process from this Court nor subject to venue without their consent and they have not given their consent for either process or venue by this Honorable Court.

/S/ Frank L. Warfield
701 Barr Building
Attorney for Defendants,
Elizabeth W. Clark Brown
and George E. Brown

45 [Filed Jan. 24, 1956] ORDER

UPON consideration of the Motion to Dismiss filed herein by the Defendants Elizabeth W. Clark Brown and George E. Brown, and Counsel for the parties hereto having been heard, and it appearing to the Court that the Defendants Elizabeth W. Clark Brown and George E. Brown are residents of the State of Maryland and that there is no venue in this Court for this case, it is by the Court this 24th day of January, 1956.

ORDERED, that the Motion to Dismiss be and the same hereby is granted and that this cause of action stands dismissed and that the plaintiff pay the costs of this proceeding.

/S/ Charles F. McLaughlin
JUDGE

46 [Filed Jan. 26, 1956]

ORDER DISMISSING ACTION AND FOR JUDGMENT

This action coming on to be heard on the motion by defendants James P. Donovan and Jessup Park Development Corporation to dismiss, and argument of counsel having been heard, and it appearing to the Court that said complaint filed herein fails to state a cause of action against said defendants upon which relief can be granted, and counsel for the plaintiff Edward J. Farrell having been offered the opportunity to amend his pleading and having apprised the Court he has no further facts to present in the matter by an amendment of his pleading, it is by the Court this 26th day of January 1956,

ORDERED, that the above entitled action be and the same hereby is dismissed as to the defendants James P. Donovan and Jessup Park Development Corporation, with judgment for costs against the plaintiff in favor of said defendants.

SEEN:

/S/ Mark P. Friedlander
Attorney for Plaintiff

/S/ Charles F. McLaughlin
JUDGE

NOTICE OF APPEAL

Notice is hereby given this ___ day of January 1956, that Edward J. Farrell, Plaintiff, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgments of this Court entered on the 24th & 26th day of January, 1956 in favor of Elizabeth W. Clark Brown and George E. Brown, and James P. Donovan and Jessup Park Development Corp., a corporation, respectively, against said Edward J. Farrell.

Please serve:

Frank L. Warfield, Esq.

121 West Street

Annapolis, Maryland

Attorney for Defendants, Brown
and

Guy M. Bayes, Esq.

Barr Building

Washington D. C.

Attorney for Defendants, Donovan
and Jessup Park Development Corp.

/S/ Mark P. Friedlander

502 Hill Building

839 - 17th St., N. W.

Washington, D. C.

Attorney for Plaintiff (Appellant)

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

JESSUP PARK DEVELOPMENT :
 CORPORATION, :
 Plaintiff :
 v. : Civil Action No. 5092-55
 EDWARD J. FARRELL, :
 Defendant :
 EDWARD J. FARRELL, :
 Plaintiff :
 v. : Civil Action No. 5093-55
 JAMES P. DONOVAN, et al. :
 Defendants :

[Filed March 13, 1956]

* * * * *

3 MR. FRIEDLANDER:

* * * * *

4 * * * in the suit which we filed which, incidentally, was one
 number different and I thought it was the first suit to be filed but it
 turned out to be the second one, in that suit we did name the Browns.
 We served them in their District of Maryland.

* * * * *

12 MR. FRIEDLANDER: That they, under the contract are entitled
 to half of the forfeiture of funds. They have not declared the deposit
 13 forfeited. There is authority and it is pretty clear that a real
 estate broker himself can not forfeit a deposit. Our claim would only be
 for commission.

* * * * *

23 MR. FRIEDLANDER:

* * * * *

25 * * * We allege that they notified the plaintiff that the contract was
 canceled; that they have a right to cancel as between themselves, I don't
 have any doubt, but as to the effect of their cancellation on the part of the
 plaintiff, his rights, there is not only grave doubt but I don't think they
 can destroy his rights.

Now we go one step further. The plaintiff was entitled to 10 per cent

of the purchase price as his commission.

* * * * *

27 As a result, Farrell has been unable to avail himself of any of the usual remedies so the only thing he has left to do is to come into this Court and tell the facts and say I have so much money on hand, I would like to apply that to my commission.

Now Donovan says, that belongs to me, I am entitled to get it back. We say you are not, it belongs to the Browns, if they will forfeit it, we will be entitled to half. If they won't forfeit it, then we want to apply
28 this to our rightful claim and it seems to me that the Browns as well as Donovan and Jessup Park are before this Court, having been duly summoned.

* * * * *

29 MR. FRIEDLANDER: The Plaintiff Farrell has in his possession a certain sum of money which is a deposit. He is entitled to recover a commission, if successful, against the sellers of 10 per cent of the purchase price.

Donovan was supposed to pay that purchase price, Mr. Farrell has an interest in 10 per cent of the purchase price.

* * * * *

31 MR. FRIEDLANDER: * * * The facts are these, when the deposit was given to Farrell, these people had agreed they would do certain things to complete the deal, he had completed his work, he had brought the parties together, he had earned his Commission.

The seller in this case did not do what he was supposed to do, the purchasers did not do what they were supposed to do. They mutually agreed to cancel the contract without regard to Farrell's rights to his commission.

32 He still has in his possession five thousand-some dollars. He can't forfeit it because only a seller can forfeit the deposit.

THE COURT: You say without respect to his rights, but the question is what are his rights?

MR. FRIEDLANDER: Ten per cent of the purchase price.

THE COURT: From whom?

MR. FRIEDLANDER: From the purchaser Donovan.

THE COURT: In the face of this clear reading--

MR. FRIEDLANDER: Yes, sir, without a doubt.

THE COURT: In face of the statement by Justice Vinson in the Giovannoni case that a mere selling agent or broker has no such interest in a contract secured by him for the purchase of land belonging to broker's client as will authorize recovery of damage by the broker from a prospective purchaser for lost commissions upon breach of the contract by the purchaser.

MR. FRIEDLANDER: Yes, sir.

THE COURT: This is a breach of the contract by the purchaser.

MR. FRIEDLANDER: By both of them.

THE COURT: Speaking of the purchaser.

MR. FRIEDLANDER: It was a breach of both of them.

THE COURT: We are speaking of the purchaser.

33 MR. FRIEDLANDER: All right, it was a breach by the purchaser, yes, sir.

THE COURT: Wherein, speaking of your claim against the purchaser, wherein does this rule not apply in this case?

MR. FRIEDLANDER: It doesn't apply to the deposit we hold in our hands which is a part of the items involved.

THE COURT: Is there anything in this rule that would indicate that?

MR. FRIEDLANDER: I don't think that case dealt with it.

THE COURT: It is so clear there isn't any question about it, is there?

MR. FRIEDLANDER: Yes, sir, lots of question.

THE COURT: In what respect, I would be glad to hear you.

MR. FRIEDLANDER: All right, sir, if I may. First of all, if we had sued Donovan alone for the commission without regard to any deposit and so forth, there wouldn't be any question in the world but that case would apply.

Now, we haven't done that. We have said to the Court by laying it

out in the complaint that we have gotten certain sums of money which Donovan deposited with us.

* * * * *

34 THE COURT: Your action is captioned "Complaint for Real Estate Commission."

MR. FRIEDLANDER: That is right, sir, based against the Browns, but your Honor will find every item in there and the prayer for relief.

THE COURT: Well, if it is a complaint for real estate commission and that is the basis and the ground for your complaint, it seems to the Court it runs squarely into the decision in the Giovannoni case.

MR. FRIEDLANDER: Irrespective of what the title is, the prayer for relief is clear, the allegations are clear, there isn't any doubt in my mind, sir, but that this clearly states a cause of action to which the case your Honor referred to does not apply at all. I am satisfied to that effect. I don't have any qualms about it at all or doubts. Now if your Honor would want to look at the complaint --

THE COURT: I have the complaint.

35 MR. FRIEDLANDER:--your Honor will see we have charged the things I have enumerated.

I have enumerated almost a conspiracy, you might say, using the term fairly loosely.

THE COURT: The Court can't construe it exactly in that respect. The Court was of the opinion that you are seeking recovery under the contract against the purchaser and isn't persuaded that you are not.

MR. FRIEDLANDER: We will stand on our complaint if your Honor would be inclined to grant the motions to dismiss, we will stand on it, sir, and apply to the Court of Appeals. I think your Honor is in error, I would like your Honor to consider it.

THE COURT: If that is your position, the Court, with all respect to counsel, doesn't quite--

MR. FRIEDLANDER: I don't think your Honor has considered the complaint sufficiently, I don't think there has been sufficient time. You

have got a complicated situation and just you take the caption of the complaint and say --

THE COURT: The Court has read the complaint. Of course, the Court would grant you leave to amend if you wish to amend.

MR. FRIEDLANDER: I have nothing to amend, sir. I have stated my case and it would be a foolish thing for me to undertake to amend something when I have nothing to change.

* * * * *

BRIEF FOR APPELLEES, JAMES P. DONOVAN AND
JESSUP PARK DEVELOPMENT CORPORATION

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,220

EDWARD J. FARRELL,
Appellant

v.

JAMES P. DONOVAN,
JESSUP PARK DEVELOPMENT CORPORATION,
ELIZABETH W. CLARK BROWN,
and
GEORGE E. BROWN,
Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Corporation

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED MAY 31 1956

Joseph W. Stewart
CLERK

(i)

No. 13,220

STATEMENT OF QUESTION PRESENTED

In the opinion of these appellees, the question is:

Can a real estate broker maintain a suit against purchasers for a sales commission which he claims to be due him, where the purchasers did not agree to pay or to be liable for any part of the commission to the broker?

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UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

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JAMES P. DONOVAN,
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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES, JAMES P. DONOVAN AND
JESSUP PARK DEVELOPMENT CORPORATION

COUNTERSTATEMENT OF CASE

These appellees adopt for the sake of brevity with the following addition, the counterstatement of the appellees Brown.

The motion to dismiss which was filed in the Court below by these appellees, was pitched on the proposition that the complaint failed to state a cause of action against them upon which relief could be granted.

After a hearing, the motion to dismiss was granted and the appellant offered the opportunity to file an amended complaint, which offer

was rejected.¹

Thereafter, the action was dismissed and judgment entered for costs against the appellant (Jt. App. 6).

SUMMARY OF ARGUMENT

A real estate broker has no right of action for commission against a prospective purchaser who fails to complete a transaction unless there is a contract between the purchaser and broker.

ARGUMENT

The complaint failed to state a cause of action against these appellees.

The action here involved is ex contractu. The complaint is headed "Complaint for Real Estate Commission." This Court has referred to the caption of a case as a means to determine the nature of an action.²

However, in this matter such reference is not necessary as the complaint spells out that the appellant brought "this suit to recover real estate commissions due him as the procuring cause of a sale of real estate located in Maryland." (Jt. App. 1)

Furthermore, in his argument on the motions to dismiss the complaint, counsel for appellant repeatedly referred to the action as one for a real estate commission (Jt. App. 8, 9).

At this point it might be well to dispose of the suggestion of appellant that this is an unusual case and does not fall within the general rule

¹ (Jt. App. 12)

THE COURT: The Court has read the complaint. Of course the Court will grant you leave to amend.

MR. FRIEDLANDER: I have nothing to amend, sir. I have stated my case and it would be a foolish thing for me to undertake to amend something when I have nothing to change.

² Adams et al. v. Humphreys, U.S. Court of Appeals, D.C. No. 12603, decided November 23, 1955.

because the sellers and the purchaser "wrongfully determined that the contract would not be made effective" (Jt. App. 3). Also, to correct a misstatement that the appellant was entitled to 10% of the purchase price as his commission. The complaint alleges that the appellees Brown agreed to pay to appellant a commission amounting to 10% of the total purchase price, which is an entirely different proposition (Jt. App. 3).

Appellant concedes that the buyer and seller had a right to cancel the contract between them.³ But, having done so, he attempts to pervert the law as stated in Lovell v. St. Louis Mutual Ins. Co., 111 U.S. 264, 28 L. ed. 423, to make it applicable to his contention that the appellant could claim his commission from the purchasers.

The appellant was not a party to the contract, except by reference as the agent of the sellers.

The appellant has not alleged nor does he contend he was a signatory to the sales agreement.

The complaint contains an allegation that the sellers and the purchasers "wrongfully determined that the contract would not be effective" which appellant's counsel strongly stressed in his argument below, as a ground for the maintenance of the action, and may renew in his oral argument to this Court. To show that the point is without merit as a basis for the action against these appellees, reference is made to the case of Dixon v. Bernstein, 86 U.S. App. D.C. 337, 182 F 2d 336. In that case an action was brought for a real estate commission. It was alleged by the agent that the contract had not been consummated on account of bad faith on the part of the purchaser. This Court held that notwithstanding the charge of bad faith, where there was no liability for a commission the question of bad faith could not be an issue.

Nor can an agent declare a forfeiture for his principal where the party entitled to has not done so.

³ Appellant's Brief pg. 9.

The Municipal Court of Appeals for the District of Columbia, in Keith v. Berry, 64 A. 2d 300, reaffirmed in 100 A. 2d 831, held that the law will not allow the agent to act for the party so entitled and benefit from such a violation of fiduciary trust.

That the purchasers are not liable to the appellant for real estate commission is quite apparent from the leading authorities on the subject.

Ordinarily, and in the absence of some understanding or agreement to the contrary, the vendor alone is liable for the payment of the commission due to a real estate broker employed by him to sell the property,⁴ and the purchaser's only liability is to pay the owner the agreed price.⁵ This is conceded to be the law by counsel for appellant in his brief, where he says that the adjudicated cases clearly support this view.⁶

One of these authorities is the case of Gibson Land Auction Co. v. Brittian, 182 N. C. 676, 110 S. E. 82. This case involved a suit brought by land auctioneers against the purchaser of property at an auction, later reduced to writing, who subsequently refused to accept the deeds. The owners released the purchaser from his bid and sold to another. The auctioneers by agreement with the owner of the property were to receive as their compensation for conducting the sale, a given per cent of the selling price of the lands.

The Supreme Court of North Carolina in deciding this case, held:

"It will be observed that the plaintiffs had no contract with the defendant, but their commissions were to be paid by the owner of the land. The case, therefore, in principle is not unlike Faison v. Marshburn, 108 S. E. 510, at the present term, where a recovery was denied to the broker, who had sued the prospective

⁴ Plantner v. Hoke, Ct. of Appeals of Ohio, 122 N. E. 298.

⁵ Moss v. Sperry, 140 Fla. 301, 191 So. 53, 125 A. L. R. 909.

⁶ Appellant's brief, pg. 10.

purchaser when he alone had a contract for his commissions with the owner. Here, as was the case there, an attempt is being made to hold the defendant responsible for violating his contract, not with the plaintiffs, but with a third party, who is a stranger to the suit. It is conceded that the plaintiffs have no interest in the land, and that they cannot sue upon the contract of purchase. They are unable to perform the contract as vendors, or to enforce its performance; hence they are not in a position to maintain an action for its breach. The only contractual obligations which may be insisted on by reason of the defendant's bid, so far as he is concerned, are those existing between the defendant and the owner of the land. The plaintiffs are neither parties nor privies to the contract of sale, and the defendant is neither party nor privy to plaintiff's contract for commissions. So, whatever rights, if any, the plaintiffs may have, as against the defendant, apparently are not contractual in their nature. On the other hand, there is no contention that the defendant has breached any extra-contractual legal duty for which the plaintiffs may maintain an action in tort. In all events, if the plaintiffs be entitled to recover, they must recover in an action growing out of the contract; and none has been shown with the defendant. * * *

"[2.] But for a further reason the plaintiffs are not entitled to maintain this suit. The owner of the land, plaintiffs' principal, has voluntarily released the defendant from his contract of purchase; hence, whatever obligations may have been incurred by the defendant's bid are now at an end. They have been surrendered and discharged with the consent of the owner, who alone was entitled to insist upon performance. There is no contract now existent, of any kind, relating to this matter, to which defendant is a party. Therefore, upon the record we think the judgment of nonsuit must be upheld. Affirmed." (Underscoring supplied)

This case was cited with approval in the controlling case on the subject in this jurisdiction, viz., Giovannoni v. Waple and James, Inc., 70 App. D. C. 229, 105 F 2d 109.

Chief Justice Vinson, then an Associate Justice of this Court, delivered the opinion of the court, saying:

" * * * The one contract involving defendants was the contract of sale entered into between defendants and the owner of the real estate. The plaintiff is not a party or privy to this contract of sale, nor are defendants parties or privies to plaintiff's contract with the owner for commission. The plaintiff had no interest in the house and could not force the owner to sell, or compel defendants to buy. The owner had a contract with the plaintiff to sell his property. It was in furtherance of this agency that plaintiff brought defendants in touch with his principal, the owner, as a result of which the contract of sale was entered into between them. The contract contains no inference that there was a double, or any, employment of the plaintiff by defendants, or that defendants obligated themselves to pay commissions. On the contrary, the contract of sale signed by the defendants expressly provided that commissions were to be paid plaintiff by the owner of the house.^{1/}

"[1, 2] It is well decided in other jurisdictions - we have found no authority to the contrary - that whenever it appears that the purchaser has not agreed to pay the broker's commission, or has not employed the broker, the purchaser is not liable for the commissions due the broker, nor liable in damages to the broker, resulting from his breach of the contract of sale.^{2/} 'A broker who is the procuring cause of a sale is entitled to no commission from the buyer unless the buyer has employed him and agreed, expressly or impliedly, to pay compensation for his services.' Lee v. Woodward, supra, note 2. 'A mere selling agent or broker has no such interest in a contract secured by him for the purchase of land belonging to the broker's client as will authorize a recovery of damages by the broker from a prospective purchaser for lost commissions upon breach of the contract by the purchaser.' Brockway-Mecklenburg Co. v. Hilderman, supra, note 2.

"We think the doctrine is supported by logic and reason and adopt it for this jurisdiction." (Underscoring supplied)

It should be pointed out that the facts are stronger in the instant matter than they were in the Giovannoni case. For, in that case the agent had been instructed by the purchasers to find a house for them. Here, there is no claim that the purchaser asked the agent to do anything.

Under the circumstances, even though appellant's right to a commission could be established, he cannot recover it from these appellees.

CONCLUSION

Since appellant has not alleged any facts which take this case out of the authorities cited herein, manifestly, the action of the Court below was proper and in accordance with law and should be affirmed.

Respectfully submitted

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Attorney for Appellees
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Jessup Park Development
Corporation

**BRIEF FOR APPELLEES ELIZABETH W. CLARK BROWN
AND GEORGE E. BROWN**

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,220

EDWARD J. FARRELL,

Appellant

v.

JAMES P. DONOVAN,

JESSUP PARK DEVELOPMENT CORPORATION,

ELIZABETH W. CLARK BROWN,

and

GEORGE E. BROWN,

Appellees

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED MAY 15 1956

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(i)

No. 13, 220

APPELLEES' STATEMENT OF QUESTIONS PRESENTED

The questions are:

1. Whether, in an action for recovery of real estate commission brought in the District of Columbia by a Virginia resident against one defendant residing in the District of Columbia and two defendants residing in the State of Maryland and personally served with process in Maryland, the Court should dismiss the action as to the defendants residing in Maryland, for lack of venue?
2. Whether the provisions of Title 28, Section 1391, U.S. Code, apply to the United States District Court for the District of Columbia?

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UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 13, 220

EDWARD J. FARRELL,
Appellant

v.

JAMES P. DONOVAN,
JESSUP PARK DEVELOPMENT CORPORATION,
ELIZABETH W. CLARK BROWN,
and
GEORGE E. BROWN,
Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES ELIZABETH W. CLARK BROWN
AND GEORGE E. BROWN

COUNTERSTATEMENT OF THE CASE

Appellant Farrell, a resident of the State of Virginia, brought suit in the United States District Court for the District of Columbia against appellees Brown, residents of the State of Maryland, and others (one a resident of the District of Columbia, the other a Maryland corporation), to recover real estate commission allegedly due him as the procuring cause of a sale of real estate located in Maryland (J. A. 1).

Process was served on the Browns in Maryland (J. A. 8).

The complaint alleged that Farrell was a licensed real estate broker for the State of Maryland and the District of Columbia (J. A. 1); that pursuant

to the authorization of the appellees Brown, he procured appellee Donovan as a purchaser of real estate owned by the Browns in the State of Maryland; that on December 30, 1954, a contract for said purchase was executed by the Browns and Donovan setting forth the price (\$115,000.00, or \$809.86 per acre, whichever amount was the smaller) and other terms of the sale; that Donovan paid to Farrell \$5,750.00 as a deposit toward the purchase price, which Farrell was to hold until settlement was made; that by the terms of the contract the Browns agreed to pay Farrell a commission of ten percent (10%) of the total purchase price; that the contract also provided that if Donovan failed to make settlement as provided for in the agreement, then the deposit made by him should be forfeited to the Browns and, in such event, Farrell would become entitled to one-half of said deposit as a compensation for his services; that settlement was delayed with the consent of all parties; that on August 17, 1955, Donovan assigned the contract to appellee Jessup Park Development Corporation; that the contract was subject to approval by the Federal Housing Administration and the Veterans Administration but Donovan failed to apply for such approval; that the contract provided that the Browns were to have the land rezoned but the Browns at the request of Donovan took no steps to obtain such rezoning; that subsequently the appellees "wrongfully determined that the contract made would not be effective and have demanded and requested that the deposit on said contract be returned" to Donovan; and that the commission due Farrell on the sale was \$11,500.00 (J. A. 2-4).

Appellant Farrell's suit asked judgment against appellees Brown and Donovan in the amount of the commission allegedly due him, \$11,500.00.

Appellees Brown filed a motion in said action to dismiss the cause on the grounds, that, as Farrell was a resident of Virginia, defendant Donovan was a resident of the District of Columbia and defendants Brown were residents of the State of Maryland, they were neither subject to process from the United States District Court for the District of Columbia nor

subject to venue therein without their consent, which consent they had not given (J.A. 5).

After hearing, the Court below dismissed the action as to appellees Brown on the ground that there was no venue in the Court (J.A. 6). Appellant Farrell's appeal from the order of dismissal is before this Court.

STATUTES AND RULES INVOLVED

Title 11, Sections 305, 306 and 308, District of Columbia Code, 1951 Edition, provide:

"Section 11-305 [18:43]. Jurisdiction - Powers of District Courts conferred.

"The United States District Court for the District of Columbia, in addition to its jurisdiction as a United States district court, shall continue to have and exercise all the jurisdiction possessed and exercised by it on August 31, 1948."

"Section 11-306 [18:44]. General jurisdiction.

"Said court (except as otherwise provided in this title) shall have cognizance of all crimes and offenses committed within said district and of all cases in law and equity between parties, both or either of which shall be resident or be found within said district * * * ."

"Section 11-308 [18:46]. Actions - Limitations upon - Inhabitants or sojourners in District of Columbia.

"No action or suit shall be brought in the District Court of the United States for the District of Columbia by original process against any person who shall not be an inhabitant of, or found within, the District, except as otherwise specially provided."

Title 28, Section 1391(a) and (b), United States Code (U.S.C.A.), Title 28, Section 1391(a)(b)), provides:

"Section 1391. Venue generally.

"(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside.

"(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law."

SUMMARY OF ARGUMENT

The United States District Court for the District of Columbia has only the jurisdiction specifically conferred by Acts of Congress. In regard to jurisdiction and venue, it is governed by the provisions of Title 11, sections 305 and 306 and 308, D.C. Code, and Title 28 U.S. Code, Section 1391, which are above set forth.

The District Court does not have jurisdiction in a civil action to recover real estate commission, over a resident of Maryland not found within the District but served in Maryland, and there is no venue in the District Court for trial of a civil action against such a Maryland resident who has not consented to trial in the District of Columbia.

ARGUMENT

The complaint shows on its face that Appellant Farrell is a resident of the State of Virginia, Appellee Donovan is a resident of the District of Columbia, Appellee Jessup Park Development Corporation is a corporation organized and existing under the laws of the State of Maryland, and the Appellees Brown are residents of the State of Maryland. The Browns were ^{not} ~~found~~ inhabitants of or found in the District of Columbia but were served personally with process in Maryland. (J.A. 2, 8). The United States District Court for the District of Columbia is a federal district court. It is governed by United States statutes respecting jurisdiction and venue. Fehlhaber Pile Co., Inc. v. Tennessee Valley Authority, 81 App. D.C. 124, 155 F. 2d 864; King v. Wall & Beaver Street

Corp. , 79 App. D. C. 234, 145 F. 2d 377.

Title 11, section 308, D. C. Code, 1951 edition, provides:

"No action or suit shall be brought in the District Court of the United States for the District of Columbia by original process against any person who shall not be an inhabitant of, or found within, the District, except as otherwise specially provided. "

Title 28, U.S. Code, Section 1391 (b) provides:

"(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law. "

In view of the plain terms of the foregoing Code provisions, the District Court had neither jurisdiction over appellees Brown nor venue to try the case as to them.

The decisions of the Supreme Court and this Court in the following cases require affirmance of the lower court's order dismissing the action for lack of venue:

Olberding v. Illinois Central Railroad Co., Inc., 346 U.S. 338

Dexter v. Lichliter, 24 App. D. C. 222

Excelsior Pebble Phosphate Co. v. Brown, (W. Va.) 74 F. 321

Fehlhaber Pile Co., Inc. v. Tennessee Valley Authority, 81 App. D. C. 124, 155 F. 2d 864

Frene v. Louisville Cement Co., 77 App. D. C. 129, 134 F. 2d 511

Hoffman v. Wash. -Va. Ry. Corp., 44 App. D. C. 418

Pang-Tsu Mow v. Republic of China, 91 App. D. C. 324, 201 F. 2d 195

King v. Wall & Beaver Street Corp., 79 App. D. C. 234, 145 F. 2d 377

In the Olberding case, an Illinois corporation brought suit in a federal district court in Kentucky, against an Indiana owner of a truck which, while on temporary business in Kentucky, collided with an overpass of the railroad, causing a derailment. The defendant was apprised of the action through service of process on the Secretary of State of Kentucky, in accordance with a Kentucky statute. The Kentucky statute did not require the designation of an agent for the service of process, and the defendant had made no such designation.

Olberding entered a special appearance and moved that the case be dismissed on the ground of improper venue. The motion was overruled and the case went to trial, resulting in a verdict for the plaintiff. The Circuit Court of Appeals affirmed the judgment.

The Supreme Court reversed the lower Courts' rulings and held that the defendant's motion that the case be dismissed on the ground of improper venue should have been granted. The Court's opinion stated:

" * * * Congress in conferring jurisdiction on the district courts in cases based solely on diversity of citizenship, has been explicit to confine such suits to 'the judicial district where all plaintiffs or all defendants reside.' 28 U.S.C. Sec. 1391 (a).

"This is not a qualification upon the power of the court to adjudicate, but a limitation designed for the convenience of litigants, and, as such, may be waived by them. * * * But unless the defendant has also consented to be sued in that district, he has a right to invoke the protection which Congress has afforded him. The requirement of venue is specific and unambiguous * * *."

The appellant contends that Title 28, sec. 1391, U.S.C. does not apply to the United States District Court for the District of Columbia because, in addition to having jurisdiction and powers of a federal district court, the Court is also a local court for the District and, as such, has jurisdiction (under Title 11, sec. 306, D.C. Code) over "all cases in law and equity between parties, both or either of which shall be found within the District of Columbia."

The decisions of this Court are, however, uniformly opposed to appellant's contention. Thus, in King v. Wall & Beaver Street Corp., supra, this Court directed the dismissal of a suit brought in the District of Columbia against Munson Lines, Inc., a Maryland corporation served outside the District, and stated that:

"It is true, as we have seen, that the District Court of the United States for the District of Columbia may exercise jurisdiction if defendants are found within the District, but it is also true that under the provisions of the local statutes, process from the District Court may not issue or be served on any person not an inhabitant of or found within the District. Code, 1940, sec. 11-308. Clearly, therefore, there is no local jurisdiction by which the Munson Line, an indispensable party, as we have seen, may be brought into this litigation."

In Dexter v. Lichliter, supra, plaintiff sued on a contract of insurance in the District of Columbia and obtained an order from the District Court requiring Dexter to appear in said District and maintain or relinquish his claim to certain moneys which the District Court ordered deposited therein. The order was served upon Dexter in the State of New York by a Deputy U.S. Marshal. This Court reversed the order with directions to set aside the return. The Court said in its opinion:

"It is an elementary principle of jurisprudence that a court of justice cannot acquire jurisdiction over the person of one who has no residence within its territorial jurisdiction, except by actual service of notice within the jurisdiction upon him or upon someone authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service." Goldey v. Morning News, 156 U.S. 518.

The decision of this Court was to the same effect in the following cases:

Fehlhaber Pile Co., Inc. v. Tennessee Valley Authority, 81 App. D.C. 124, 155 F. 2d 864

Frene v. Louisville Cement Co., 77 App. D.C. 129

King v. Wall & Beaver Street Corp., 79 App. D.C. 234, 145 F. 2d 377

In the Fehlhaber Pile Co., Inc. v. Tennessee Valley Authority case, supra, this Court ruled in an action for alleged breach of contract against a corporation domiciled in Alabama that the United States District Court for the District of Columbia is governed by national legislation respecting venue and jurisdiction and that the corporation, domiciled in Alabama and not doing business in the District of Columbia, could not be brought within the District's jurisdiction by serving process upon its employee within said District, and that venue did not lie in the United States District Court for the District of Columbia.

In its opinion, the Court stated:

"2. * * * the District Court of the United States for the District of Columbia is both a federal district court and the local trial court of general jurisdiction. (Citing King v. Wall & Beaver Street Corp., 1944, 79 U.S. App. D.C. 234, 145 F. 2d 377.) As the former, it is governed by national legislation respecting venue, jurisdiction, procedure and the like, embodied in the United States Code. (Underscoring supplied.) As the latter, it is governed by local legislation, embodied in the District of Columbia Code.

"Since appellee was not doing business within the District of Columbia, the condition of its waiver of venue was not met."

The cases cited in appellant's brief (Hoffman v. Wash. Virginia Ry. Co., 44 App. D.C. 418, and King v. Wall & Beaver Street Corporation, 79 App. D.C. 234), are in accord with appellees' argument herein.

In the Hoffman case, in an action brought in the District of Columbia by a Virginia resident against a Virginia corporation, the corporation had an office in the District, was doing business here, and process was served in the District upon its duly appointed agent.

In the King case, the corporation (Munson Line, Inc., a Maryland corporation), was not found within this District and was not doing business here. It was served with process at its office in Baltimore. This Court directed the lower court to grant Munson Line's motion to dismiss the action. The Court's opinion is quoted in appellees' argument above.

CONCLUSION

The appellees Brown, being residents of the State of Maryland, served with process in Maryland, and not having consented to trial in the District of Columbia, were not subject to jurisdiction or venue of the United States District Court of the District of Columbia. The lower court properly granted their motion to dismiss the action as to them and its decision should be affirmed.

Respectfully submitted,

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